RECENT DECISIONS.

DENTON D. ROBINSON, *Editor-in-Charge.*

ALIENS—DEPORTATION OF CHINESE—POWER OF SECRETARY OF LABOR.—The applicant for a writ of habeas corpus was held under a warrant issued by the Secretary of Labor, charged with having been found in the United States in violation of the Chinese Exclusion Laws. The Immigration Department now threatens to bring the relator to a hearing before an Immigration Commissioner to determine whether he is subject to deportation. *Held,* the judicial department alone has authority to order the deportation of this alien. Applicant discharged. *Ex parte Woo Jan* (D. C. E. D. Ky. 1916) 228 Fed. 927.

Under the Chinese Exclusion Laws, Act Sept. 13, 1888, c. 1015, 25 Stat. 476, 479, aliens found in the United States in violation thereof are entitled to a judicial hearing for the determination of the question whether they are deportable according to the provisions of the act, while under the Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 898, the Secretary of Labor, through the Immigration Department, possesses the power of deporting after a hearing before an official of that Department. § 21 of the Immigration Act provides such a hearing for aliens subject to deportation under the provisions "of any law of the United States", and for their subsequent deportation in accordance with its provisions if the charge against them is sustained. § 43 enacts that the act "shall not be construed to repeal, alter or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent". Nevertheless, the opinion of the federal judiciary has almost unanimously been that an alien in the United States in violation of the Chinese Exclusion Acts may be deported through proceedings under § 21 of the Immigration Act. *Ex parte Woo Shing* (D. C. 1915) 226 Fed. 141; *Sibray* v. *United States ex rel. Yee Yok Yee* (C. C. A. 1915) 227 Fed. 1; *Ex parte Chun Woi San* (D. C. 1914) 230 Fed. 538; see *Ex parte Lam Pui* (D. C. 1914) 217 Fed. 456; *Ex parte Wong Yee Toon* (D. C. 1915) 227 Fed. 247; *cf. Wallis* v. *United States ex rel. Ng Sam* (C. C. A. 1916) 230 Fed. 71. These courts felt themselves bound by the decision of the Supreme Court in *United States* v. *Wong You* (1912) 223 U. S. 67, 32 Sup. Ct. 195, but that case only decided that, as noted in the principal case, Chinamen who had entered the United States in violation of the Immigration Act could be deported under its provisions. The case cannot be cited to uphold the decision in cases where there has been a deportation under the Immigration Act for a violation of the Chinese Exclusion Act, although the reasoning of the court goes far to support such a holding. If such a reading is given, however, the provision that the Exclusion Acts are not altered, amended or repealed by it, is ignored, since transferring the power to order deportation from the judicial to the legislative arm of the government is a substantial departure from the provision of the Exclusion Act. *Ex parte Wong Tuey Hing* (D. C. 1914) 213 Fed. 112, overruled by *Ex parte Chun Woi San, supra.*

BANKRUPTCY AS AN ANTICIPATORY BREACH OF CONTRACT.—The trustee of an involuntary bankrupt transfer company refused to complete an executory contract with a hotel to care for the latter's baggage and

livery business. In a suit by the hotel company, it was *held* that proceedings, whether voluntary or involuntary, resulting in an adjudication in bankruptcy, are the equivalent of an anticipatory breach of an executory agreement so as to entitle the hotel company to prove its claim against the bankrupt estate. *Central Trust Co.* v. *Chicago Auditorium Ass'n.* (1916) 36 Sup. Ct. 412.

There has been a considerable diversity in the decisions of the state and federal courts on this important question, as has been noted and discussed in 8 Columbia Law Rev. 305 and 13 Columbia Law Rev. 172. This is the first time the question has come before the Supreme Court, and while this case settles the law on the subject, it by no means remedies the deficiencies which are inherent in the Bankruptcy Act of 1898. The doctrine of anticipatory breach is inadequate to remove these deficiencies because of its narrow application, and because it still leaves the obligee an option to prove with the other creditors, or wait until the performance day of the contract arrives and then call upon the bankrupt to perform his agreement, to which action a discharge in bankruptcy would be no defense. See 8 Columbia Law Rev. 305 and 10 Columbia Law Rev. 709.

Banks and Banking—Misappropriation of Trust Funds—Liability of Bank.—An executor deposited to his personal account in the defendant bank checks drawn by him upon the estate's deposit in another bank. Some of the money so deposited was used to discharge his personal obligations to the defendant bank, and part to discharge personal obligations to other parties. In a suit on behalf of the beneficiary, *held,* the defendant is not liable for misappropriations made prior to such payment by the executor of his individual debt. Such payment, however, was sufficient to put the defendant on notice, and hence it is liable to the estate for all subsequent misappropriations. *Bischoff* v. *Yorkville Bank* (Ct. of App., N. Y., 1916) 55 N. Y. L. J. 619.

This decision, proceeding along the lines suggested in 10 Columbia Law Rev. 162, 11 *id.* 428, 13 *id.* 727, and 16 *id.* 341, soundly settles a doubtful question of New York law. The court refuses to burden the bank with liability unless the circumstances are such as to clearly put it on inquiry concerning the actions of the fiduciary.

Banks and Banking—Unclaimed Deposits—Constitutional Law.—A State statute required a bank to transfer to the state treasurer unclaimed deposits. The defendant bank contended that since the statute did not provide for such notice to the depositors and to the bank as would constitute due process of law, it deprived the bank of a property right without due process, rendered the institution liable to the depositors, and hence was unconstitutional. *Held,* the statute was constitutional and the deposit should be transferred. *State* v. *Security Savings Bank* (Cal. App. 1915) 154 Pac. 1070.

The right to regulate concerning the property of an absentee is an attribute which belongs to the government, *Cunnius* v. *Reading School District* (1905) 198 U. S. 458, 25 Sup. Ct. 721, and it is within the power of the state to legislate as to such property in the custody of a bank, *Provident Inst. for Savings* v. *Malone* (1911) 221 U. S. 660, 31 Sup. Ct. 661, particularly since banks are under the control and regulation of the state. See Magee, Banks and Banking (2nd ed.) 2. The bank cannot object that its property right is invaded because in the contract between the bank and the depositor there is an implied

condition that the deposit is subject to termination by the state when circumstances justify the state taking the deposit into its care. *Attorney General* v. *Provident Inst. for Savings* (1909) 201 Mass. 23, 86 N. E. 912. The depositor loses no rights because the state holds the fund as trustee for him. See *Attorney General* v. *Provident Inst. for Savings, supra.* In the principal case the bank is protected by statute from any action by the depositor, and since the transfer of the deposit to the state does not amount to an escheat, the statute requiring the transfer of unclaimed deposits is not rendered unconstitutional because it does not provide for notice.

CHAMPERTY—CONTRACT VOID—RECOVERY BY ATTORNEY IN QUANTUM MERUIT.—The plaintiff, an attorney, made a contract with the defendant, his client, by which the right to compromise the client's suit was restrained. *Held,* he may recover in *quantum meruit,* as the services in themselves are not illegal. *City of Rochester* v. *Campbell* (Ind. 1916) 111 N. E. 420.

Any contract between an attorney and his client by which the right of the client to compromise the suit is restrained, is invalid, *Davis* v. *Webber* (1899) 66 Ark. 190, 49 S. W. 822, nor is such a clause separable from any valid part of the contract. *Davis* v. *Webber, supra; contra, Granat* v. *Kruse* (1904) 114 Ill. App. 488. However, where the services rendered are not of themselves illegal and the champertous contract need not be relied on, a recovery in *quantum meruit* is usually allowed. *Davis* v. *Webber, supra; Stearns* v. *Felker* (1871) 28 Wis. 594. The courts which take the opposite view consider such a recovery against public policy, as an inducement to champerty. *Roller* v. *Murray* (1911) 112 Va. 780, 72 S. E. 665. Where the services rendered are in themselves illegal, as those under a contract to procure a divorce, no implied contract to pay will be raised. *Barngrover* v. *Pettigrew* (1905) 128 Iowa 533, 104 N. W. 904. Where the contract between attorney and client provides that the attorney is to pay the expenses of the litigation in turn for compensation by a contingent fee, the contract has been considered not only void, but illegal, and recovery denied. *Moreland* v. *Devenney* (1905) 72 Kan. 471, 83 Pac. 1097; *cf. Gammons* v. *Gulbranson* (1899) 78 Minn. 21, 80 N. W. 779. The champertous contract may be introduced in evidence in the suit in *quantum meruit* as evidence of what the parties themselves thought the services worth. *Davis* v. *Webber, supra; contra, Holloway* v. *Lowe* (1840) 1 Ala. 246.

CITIZENSHIP—EXPATRIATION.—The relator, a native of Sweden, naturalized in the United States, returned to Sweden and lived there for more than two years. *Held,* in the absence of proof to the contrary, he is to be considered as expatriated and an alien, under the Act of March 2, 1907, 34 Stat. 1228, § 2. *United States ex rel. Anderson* v. *Howe* (D. C., S. D. N. Y. 1916) 55 N. Y. L. J. 89. See Notes, p. 502.

COMMON LAW—ADOPTION—JUDGMENTS AGAINST JOINT TORT-FEASORS.—Appellant had recovered judgment against one joint tort-feasor, but execution was returned unsatisfied. In an action against other joint tort-feasors, the defendants demurred on the ground that such judgment operated as a bar. The common law of England prior to the 4th year of the reign of James I had been adopted by statute, and

the rule is well settled in that country since 1606 that a judgment against one joint tort-feasor bars an action for the same cause against another. But the court refused to follow this rule, and *held* that only full satisfaction would bar the plaintiff. *Ketelson* v. *Stilz* (Ind. 1916) 111 N. E. 423. See Notes, pp. 499, 510.

CORPORATIONS—PROMISSORY NOTES—PRESUMPTION OF AUTHORITY OF PRESIDENT TO EXECUTE.—The plaintiff, a purchaser for value without notice, sued the defendant, a real estate corporation, on two promissory notes executed in the name of the corporation by its president. *Held,* proof that the president executed the notes was *prima facie* evidence of his authority to bind the corporation in that manner. *Moyse Real Estate Co.* v. *First Nat. Bank of Commerce* (Miss. 1916) 70 So. 821.

Whether or not a presumption exists that a president of a corporation has authority to bind it by contracts executed by him in its behalf is essentially a question of agency. *Lloyd & Co.* v. *Matthews* (1906) 223 Ill. 477, 79 N. E. 172; *Ceeder* v. *Loud Lumber Co.* (1891) 86 Mich. 541, 49 N. W. 575. Accordingly, by the weight of authority, a contract made by the president for the corporation, in the usual course of business and within the corporate powers, and which the directors might have authorized him to make, is presumed to be binding on the corporation until lack of the president's authority is shown. *Patteson* v. *Ongley Elec. Co.* (1895) 87 Hun 462, 34 N. Y. Supp. 209, aff'd. 155 N. Y. 674, 49 N. E. 1101; *National State Bank* v. *Vigo Co. Nat. Bank* (1895) 141 Ind. 352, 40 N. E. 799; *Omaha Wool & Storage Co.* v. *Chicago etc. R. R.* (1914) 97 Neb. 50, 149 N. W. 55. In a few jurisdictions, however, the rule seems to be that where the authority of the president is challenged, this presumption does not exist. *Lyndon Mill Co.* v. *Lyndon Literary & Biblical Inst.* (1891) 63 Vt. 581, 22 Atl. 575. But, when the president performs an act not incidental or pertaining to the business of the corporation, nor engrafted thereon by a well established usage, his authority must be proved. *Cushman* v. *Cloverland Coal & Mining Co.* (1908) 170 Ind. 402, 84 N. E. 759; *Mathias* v. *White Sulphur Springs Assn.* (1897) 19 Mont. 359, 48 Pac. 624. Consequently, the president of a non-trading corporation is not presumed to have authority to bind the corporation by executing notes in its behalf, 13 Columbia Law Rev. 438; *St. Vincent College* v. *Hallett* (C. C. A. 1912) 201 Fed. 471; *People's Bank* v. *St. Anthony's etc. Church* (1888) 109 N. Y. 512, 521, 17 N. E. 408, and where the president of any corporation is named as payee in a note which he signs in his official capacity, such instrument puts a holder on notice as to the president's authority. *Capital City Brick Co.* v. *Jackson* (1907) 2 Ga. App. 771, 59 S. E. 92; *Porter* v. *Winona & Dakota Grain Co.* (1899) 78 Minn. 210, 80 N. W. 965. Still, a president of a trading corporation, being its chief administrative officer, is ordinarily presumed to have authority to execute promissory notes in the name of the corporation. *Dexter Savings Bank* v. *Friend* (C. C. 1898) 90 Fed. 703; *Lloyd & Co.* v. *Matthews, supra; cf. Chestnut St. Trust etc. Co.* v. *Record Pub. Co.* (1910) 227 Pa. 235, 75 Atl. 1067; *contra, City Elec. St. Ry.* v. *First Nat. Exchange Bank* (1896) 62 Ark. 33, 34 S. W. 89.

CRIMINAL LAW—CRIME COMMITTED PARTLY WITHIN AND PARTLY WITHOUT STATE—STATUTE—CONSTRUCTION.—Defendant was charged with larceny by false pretences. It appeared that the false pretences were

made in New York and the money obtained in Pennsylvania. *Held,* under § 1930 of the Penal Law (Consol. Laws c. 40), providing that a person who commits within the state any crime, in whole or in part, is liable to punishment within the state, the defendant is guilty if the transaction constituted a crime under the law of New York, regardless of the law in the state where it was consummated. *People* v. *Zayas* (N. Y. 1916) 111 N. E. 465.

Undoubtedly the general rule is that the laws of the state do not extend beyond its own territories, *The Apollon* (1824) 9 Wheat. 362, 370, and in the absence of a statute, the prevailing view is that the crime of obtaining money by false pretences is punishable only in the jurisdiction where the money is obtained. *Connor* v. *State* (1892) 29 Fla. 455, 10 So. 891; *Bates* v. *State* (1905) 124 Wis. 612, 103 N. W. 251. Usually, however, state statutes punishing any crime committed in part within the state have been upheld. *Richburger* v. *State* (1907) 90 Miss. 806, 44 So. 772; *People* v. *Botkin* (1908) 9 Cal. App. 244, 98 Pac. 861; *People* v. *Arnstein* (1914) 211 N. Y. 585, 105 N. E. 814. In construing somewhat similar statutes punishing as larceny the bringing into the state of goods stolen in another state, the question whether the original taking constituted larceny is to be determined by the laws of the state passing the statute and not by the laws of the place where the property was first taken. *Barclay* v. *U. S.* (1902) 11 Okla. 503, 69 Pac. 798; *State* v. *White* (1907) 76 Kan. 654, 92 Pac. 829; *contra, Territory* v. *Hefley* (1893) 4 Ariz. 74, 33 Pac. 618. It seems that the same rule was properly applied in the principal case. The object of the statute was to extend the scope of the laws of New York within the state. In enforcing those laws, it is unnecessary to inquire whether the completed act is a crime in the foreign state, for the laws of Pennsylvania have no bearing on the question of whether the laws of New York have been violated. The courts of no jurisdiction execute the penal laws of another. See *The Antelope* (1825) 10 Wheat. 66, 123; *Huntington* v. *Attrill* (1892) 146 U. S. 657, 666, 13 Sup. Ct. 224, 227.

DAMAGES—SLANDER—UNAUTHORIZED REPETITION BY THIRD PERSONS.—In an action for slander, where the words alleged to have been spoken by the defendant were actionable *per se,* the trial court refused to instruct the jury that the plaintiff was entitled to recover only for the damage resulting directly from the utterance by the defendant. The defendant appealed. *Held,* since repetition is the natural and probable result of the original slander, the plaintiff may recover damages resulting therefrom. *Southwestern Tel. & Tel. Co.* v. *Long* (Tex. Civ. App. 1916) 183 S. W. 421. See Notes, p. 505.

DESCENT AND DISTRIBUTION—RELEASE OF EXPECTANCY BY HEIR.—The plaintiff, in consideration of a conveyance to him of certain property by his father, executed a release of all rights in the latter's estate. The father died intestate. The plaintiff then claimed his distributive share in the estate, less the amount advanced to him. *Held,* the release was binding, and barred him from inheriting anything. *Boyer* v *Boyer* (Ind. App. 1916) 111 N. E. 952. See Notes, p. 512.

EQUITY—JURISDICTION—REMOVING CLOUD ON TITLE TO A CHOSE IN ACTION.—Complainant, by an assignment absolute on its face, transferred to his mother his interest in a life insurance policy made pay-

able to himself. After the death of his mother he brought a bill in equity to reform the assignment to conform to the alleged agreement that the policy should revert to him in case his mother died first. Certain distributees, residents of foreign states, were served by publication. On demurrer to the jurisdiction of the court over such non-residents, it was *held,* that the action was *quasi in rem* and that, since the court had before it the *res,* the claim against the insurance company, it could render a valid decree settling the rights of the parties under the policy. *Perry* v. *Young* (Tenn. 1916) 182 S. W. 577.

Assuming that the *situs* of the claim against the company was in any jurisdiction where it could be served with process through a duly accredited agent, see 16 Columbia Law Rev. 414, the court, under the statutes, could render a valid decree *in rem,* provided the nature of the claim presented a proper ground for invoking the jurisdiction of equity. The jurisdiction of equity to remove a cloud on title to realty is well recognized, and the maxim that equity acts *in personam* has no application where the power is conferred by statute. *Arndt* v. *Griggs* (1890) 134 U. S. 316, 10 Sup. Ct. 557; *Morris* v. *Graham* (C. C. 1892) 51 Fed. 53. Equity may, in a similar manner, take jurisdiction to remove a cloud on the title to a chose in action, *Ryan* v. *Seaboard etc. R. R.* (C. C. 1897) 83 Fed. 889; *Lockwood* v. *Brantly* (N. Y. 1883) 31 Hun 155, and it is no objection to an order for publication based on such a bill that the complaint asks more relief than can be obtained without personal service. *Chesley* v. *Morton* (1896) 9 App. Div. 461, 41 N. Y. Supp. 463. Such a proceeding is one *quasi in rem.* See *Sohege* v. *Singer Mfg. Co.* (1907) 73 N. J. Eq. 567, 68 Atl. 64. It is especially to be noted that the courts of at least one jurisdiction have been exceptionally liberal in granting relief to determine the rights of parties under an insurance policy because of its peculiar nature. See *Cohen* v. *New York etc. Ins. Co.* (1872) 50 N. Y. 610, 624; *Langan* v. *Supreme Council* (1903) 174 N. Y. 266, 66 N. E. 932; *Hadley* v. *Travelers Ins. Co.* (1910) 68 Misc. 359, 125 N. Y. Supp. 88. It has sometimes been said that the proper remedy for the insurance company where there are adverse claimants is by an action of interpleader, see *Bullowa* v. *Provident etc. Co.* (1908) 125 App. Div. 545, 109 N. Y. Supp. 1058; *Gleason* v. *Northwestern etc. Ins. Co.* (1911) 203 N. Y. 507, 97 N. E. 35, but in the principal case such remedy could not be available since the distributees of the assignee would not be entitled to recover upon the policy until the death of the complainant.

EVIDENCE—ADMISSION BY SILENCE.—In an action against A and B for malpractice, the plaintiff attempted to introduce in evidence as an admission the following facts: in answer to a question asked by B, A's clerk C, who was not then in B's actual presence, made a statement, not called for by the question, which charged B with gross negligence. To this B made no reply. *Held,* B's silence did not constitute an admission. *State ex rel. Tiffany* v. *Ellison* (Mo. 1916) 182 S. W. 996.

Where statements are made in the presence of a party to the action, his silence operates as an admission of their truth only when they are made under such circumstances as would naturally call for an answer, and the person hearing them understands their meaning and is able to make a reply. *Commonwealth* v. *Kenney* (1847) 53 Mass. 235; *State* v. *Baruth* (1907) 47 Wash. 283, 91 Pac. 977; 2 Chamber-

layne, Evidence § 1423. But such evidence is always received with great caution, *Moore* v. *Smith* (Pa. 1826) 14 Serg. & R. 388, especially where the statements are made by strangers to the controversy, for such statements may be regarded as immaterial or impertinent. *Larry* v. *Sherburne* (1861) 84 Mass. 34; see *Briel* v. *Exchange Nat. Bank* (1911) 172 Ala. 475, 55 So. 808; but *cf. Boyles* v. *M'Cowen* (1810) 3 N. J. L. 677, 678. Silence is not an admission if the party refrains from speaking by advice of counsel, *People* v. *Conrow* (1911) 200 N. Y. 356, 93 N. E. 943, or if the statement is made to him merely for the purpose of drawing out his evidence, *Mattocks* v. *Lyman & Cole* (1844) 16 Vt. 113, for in the latter case silence may be the only wise and prudent course. *Boney* v. *Boney* (1913) 161 N. C. 614, 77 S. E. 784. Nor is the failure to reply to testimony at a trial an admission of its truth, as the party could not interrupt the proceedings, and even if called as a witness could not volunteer answers. *Horan* v. *Byrnes* (1903) 72 N. H. 93, 54 Atl. 945; *Leggett* v. *Schwab* (1906) 111 App. Div. 341, 97 N. Y. Supp. 805; *contra, Harlow* v. *Perry* (Me. 1916) 96 Atl. 775. To be admissible, the statement need not be spoken in the immediate presence of the party; it is sufficient if he is near by. *State* v. *Baruth, supra; Commonwealth* v. *Sliney* (1878) 126 Mass. 49. The principal case seems sound, since the statement was made by a stranger who was not then in the defendant's presence.

EVIDENCE—RECITAL OF CONSIDERATION IN DEEDS—PRESUMPTION.—Peggy Hudson conveyed land to Adams who in turn conveyed to the defendant. The heirs of Peggy Hudson seek to cancel her deed to Adams on account of the insanity of the grantor, and that from Adams to the defendant on the ground that the defendant was not a *bona fide* purchaser. *Held,* the recital in the second deed of the payment of consideration is no evidence against the plaintiff. *Adams Oil & Gas Co.* v. *Hudson* (Okla. 1915) 155 Pac. 220.

When the recital in a deed of payment of consideration is merely a receipt it raises a presumption against the parties to the deed, or those claiming through or under them, that the consideration has been paid, *Stauffer* v. *Martin* (1909) 43 Ind. App. 675, 88 N. E. 363; see *Sillyman* v. *King* (1873) 36 Iowa 207; *Lloyd* v. *Lynch* (1857) 28 Pa. 419, and such recital is conclusive to prevent the grantor from questioning the validity of the conveyance. See *Shehy* v. *Cunningham* (1909) 81 Oh. St. 289, 90 N. E. 805; Jones, Evidence (2nd ed.) § 470. When, however, third parties attack the deed, the more general view is that a recital in the nature of a receipt is inadmissible as evidence against a stranger to the deed, *Ely* v. *Pace* (1904) 139 Ala. 293, 35 So. 877; *Minneapolis & St. L. R. R.* v. *Chicago M. & St. P. R. R.* (1902) 116 Iowa 681, 88 N. W. 1082, even though he have the equitable title, *King* v. *Mead* (1899) 60 Kan. 539, 57 Pac. 113, though some courts have held that even against strangers a recital of payment is *prima facie* evidence of the fact of payment. *McConnell* v. *Citizens' State Bank* (1891) 130 Ind. 127, 27 N. E. 616; *Doody* v. *Hollwedel* (1897) 22 App. Div. 456, 48 N. Y. Supp. 93. But, as the reason a recital is *prima facie* evidence against the grantor and his heirs is that it is an admission made by the grantor, 2 Devlin, Deeds (3rd ed.) § 817, while as against a third party such recital would be a mere *ex parte* declaration, not under oath, and taken without opportunity of cross-examination, *Lloyd* v. *Lynch, supra,* those cases

excluding such recitals as evidence against strangers appear correct. Hence the principal case seems rightly decided.

EXTRADITION — INTERSTATE RENDITION — SURRENDER OF FUGITIVE TO A THIRD STATE.—The plaintiff had been extradited from Oregon to Texas, and was there tried and acquitted on a charge of murder. Instead of being then released, she was held pursuant to a requisition from the Governor of Georgia for delivery to that state as a fugitive from justice. She contended that she was entitled to release from custody, on the ground that the federal statute gave the Governor of Texas no authority to order her extradition, since she was never a fugitive from justice from Georgia to Texas, but had been brought there unwillingly under legal process. *Held,* by the omission to extend the federal rendition statute to the full limits of the constitutional power, it must have been intended to leave the circumstances unprovided for subject to the state authority, and hence, by the principles of comity, the plaintiff was not entitled to a release. *Innes* v. *Tobin* (1916) 36 Sup. Ct. 290.

Reasoning from the right of protection, or asylum, which a fugitive from justice has in international cases, as shown in *United States* v. *Rauscher* (1886) 119 U. S. 407, 7 Sup. Ct. 234, it has been maintained that where a defendant is brought into a state as a fugitive from justice and has served sentence or been acquitted, he cannot be surrendered to the authorities of another jurisdiction as a fugitive, but must be allowed an opportunity to return to the state from which he was extradited. *Matter of Hope* (1889) 7 N. Y. Cr. 406, 10 N. Y. Supp. 28; Spear, Extradition (2nd ed.) 558, 571; but *cf. Hackney* v. *Welsh* (1886) 107 Ind. 253, 8 N. E. 141. But the distinction between the principles of international extradition and interstate rendition should be kept clear, *Lascelles* v. *Georgia* (1893) 148 U. S. 537, 13 Sup. Ct. 687; *State* v. *Stewart* (1884) 60 Wis. 587, 19 N. W. 429, and it should be remembered that all of the United States have a common interest in the punishment of crime, and under the Constitution and federal law they have no power to grant an asylum to fugitives from other states after a proper requisition for their return has been made. *Mahon* v. *Justice* (1888) 127 U. S. 700, 715, 8 Sup. Ct. 1204; 6 Columbia Law Rev. 522. Hence it follows that, since the omission to extend the federal statute to the full limits of the constitutional power left the subject to the state authorities, and since a state has no right to accord asylum or dictate terms of surrender, according to the principles of interstate rendition founded on the Constitution and the Act of Congress, it cannot be contended that the accused, having been brought to the surrendering state against his will by legal process, must be allowed an opportunity to return to the state from which he was extradited, as the question of his surrender is, rather, to be determined in any state in which he may be "found". *People* v. *Sennott* (Cir. Ct., Cook Co., Ill. 1879) 20 Alb. L. J. 230; Church, *Habeas Corpus* § 472 C; 2 Moore, Extradition & Interstate Rendition §§ 645-648.

GARNISHMENT—COMMON CARRIERS—GOODS IN TRANSIT.—The plantiff seeks to hold a railroad company liable as garnishee for the value of goods shipped by the defendant, consigned to a point without the state, but actually in transit within the state, though in another

county, when notice of garnishment was served on the railroad's agent. *Held,* the carrier is not liable as garnishee. *Dart Mfg. Co.* v. *Carr* (Iowa 1916) 156 N. W. 714.

Though goods are subject to garnishment in the hands of a bailee, *Farmers & Mechanics' Bank* v. *Welles* (1877) 23 Minn. 475; *Elser* v. *Rommel* (1893) 98 Mich. 74, 56 N. W. 1107, even when the bailee is a common carrier holding them within the state as warehouseman whether before or after the actual carriage, *Cooley* v. *Minnesota Transfer Ry.* (1893) 53 Minn. 327, 55 N. W. 141; *Landa* v. *Holck & Co.* (1895) 129 Mo. 663, 31 S. W. 900; *Rosenbush* v. *Bernheimer* (1912) 211 Mass. 146, 97 N. E. 984, the authorities are substantially unanimous to the effect that goods in transit without the state are not to be garnished. *Montrose Pickle Co.* v. *Dodson & Hills Mfg. Co.* (1888) 76 Iowa 172, 40 N. W. 705; *Western R. R.* v. *Thornton & Acee* (1878) 60 Ga. 300; *Bates* v. *Chicago M. & St. P. Ry.* (1884) 60 Wis. 663, 19 N. W. 72. The principal case is supported by the great weight of authority in applying this rule to property in transit within the state. *Illinois Central R. R.* v. *Cobb* (1868) 48 Ill. 402; *Baldwin* v. *Great Northern Ry.* (1900) 81 Minn. 247, 83 N. W. 986; see *Bates* v. *Chicago M. & St. P. Ry., supra; contra, Adams* v. *Scott* (1870) 104 Mass. 164. It has been suggested that the carrier cannot legally be prevented from carrying out its contract and thus be subjected to liability to the consignee or assignee of the bill of lading, but it seems that it would be protected by a valid garnishment, *Adams* v. *Scott, supra,* and, moreover, this argument would be equally valid against permitting garnishment of goods in the carrier's hands as warehouseman before or after transit. Furthermore, since private carriers are not accorded a similar protection against garnishment, *Elser* v. *Rommel, supra,* it seems clear that the extent of the business ordinarily conducted by common carriers, involving great practical difficulties in stopping goods in transit, is the true and logical ground for the prevailing view. See *Bates* v. *Chicago M. & St. P. Ry., supra.*

INJUNCTIONS—MANDATORY AND PROHIBITIVE—EFFECT OF APPEAL.—The plaintiff obtained in a former action an injunction *pendente lite* to restrain the city of San Francisco from running over tracks owned in common by the plantiff and the city more cars than their contract allowed. The defendant appealed from the decree and continued to use the tracks as it had been doing. The plaintiff sought an original writ of mandate to compel the Superior Court to cite and punish the mayor and other officials for their disobedience of the court's order. *Held,* one judge dissenting, the city officials were in contempt, since the injunction was prohibitory and therefore was not suspended by the appeal. *United Railroads of San Francisco* v. *Superior Court* (Cal. 1916) 155 Pac. 463. See Notes, p. 507.

INSURANCE—MARINE—RESTRAINT OF PRINCES.—Two British vessels bound from South America to Germany were detained in British ports in consequence of the declaration of war and the proclamations prohibiting trade with the enemy. *Held,* there was a constructive total loss due to "restraints of kings, princes, and people" within the meaning of the policy. *Sanday & Co.* v. *British and Foreign Marine Ins. Ltd.* [1915] 2 K. B. 781, aff'd. H. L. (1916) 140 L. T. 283.

The restraint need not be by actual seizure nor by the direct application of physical force to the goods, *Rodoconachi* v. *Elliott* (1874)

L. R. 9 C. P. 518; *Olivera* v. *Union Ins. Co.* (1818) 16 U. S. 183; *cf. The Athanasios* (D. C. 1915) 228 Fed. 558, but it must be actual and not potential or probable; mere fear of seizure is not enough, *Kacianoff* v. *China Traders' Ins. Co.* [1914] 3 K. B. 1121; *King* v. *Delaware Ins. Co.* (C. C. 1808) 14 Fed. Cas. 516, aff'd. (1810) 10 U. S. 71, unless the peril be so imminent as to amount to actual restraint. *Cf. Nobel's Explosives Co.* v. *Jenkins & Co.* [1896] 2 Q. B. 326. Such restraint must be by the ruling power of the country and not by a mob of individuals, *Nesbitt* v. *Lushington* (K. B. 1792) 4 T. R. 783, but it does not include ordinary judicial process. Rule 10 of Rules for Construction of Policy in Schedule to Marine Ins. Act, Ch. 41 of Public General Stat. of 1906; *cf. Finlay* v. *Liverpool & Gt. Western S. S. Co.* (Exch. 1870) 23 L. T. [N. S.] 251; but *cf. Simpson* v. *Charleston Fire & Marine Ins. Co.* (S. C. 1838) Dud. 239. Yet it has been extended to an executive decreė enforcing the sanitary regulations of a country, *Miller* v. *Law Accident Ins. Co.* [1903] 1 K. B. 712, and to a detention at quarantine. *The Progreso* (C. C. A. 1892) 50 Fed. 835. Hence it seems that the declaration of war and the proclamation prohibiting trade in the principal case were sufficiently distinct from the ordinary operation of the law to constitute a restraint within the meaning of the policy. Nor does it seem that the acts of the government of the insured are excepted, for a domestic embargo is included in the clause by the decisions in this country, *Odlin* v. *Insurance Co. of Pa.* (C. C. 1808) 18 Fed. Cas. 583; *M'Bride* v. *Marine Ins. Co.* (N. Y. 1810) 5 Johns. *299; *Lorent & Steinmitz* v. *S. C. Ins. Co.* (S. C. 1819) 1 Nott & McC. 505, and the rule in England seems to be the same. 1 Park, Marine Ins. (8th ed.) 175.

INSURANCE—PERIOD OF LIMITATION—COMMENCEMENT OF THE PERIOD.—A fire insurance policy stipulated that no action should be maintainable against the insurer unless commenced with twelve months next after the fire. Another clause provided that the policy should not become payable until sixty days after ascertainment and satisfactory proof of the loss to the company. In an action upon the policy, *held,* the period of limitation began to run from the date of the fire, not from the accrual of the cause of action. *Wever* v. *Pioneer Fire Ins. Co.* (Okla. 1915) 153 Pac. 1146.

It is generally recognized that the parties to an insurance contract may agree to waive the benefit of the Statute of Limitations and confine the time within which a suit upon the policy may be brought to a shorter period than that determined by the statute. *Tasker* v. *Kenton Ins. Co.* (1878) 58 N. H. 469; Richards, Insurance, § 326. When it is stipulated that the period shall commence with the date of the "loss", a number of courts, construing this provision together with the other terms of the policy, have interpreted the word "loss" to mean the accrual of the insured's cause of action against the company, thus avoiding the possibility that the period might elapse before the insured. under the terms of the policy, could bring suit. *Steen* v. *Niagara Fire Ins. Co.* (1882) 89 N. Y. 315; *Sun Ins. Co.* v. *Jones* (1891) 54 Ark. 376, 15 S. W. 1034; *German Fire Ins. Co.* v. *Fairbank* (1891) 32 Neb. 750, 49 N. W. 711; *contra, Rottier* v. *German Ins. Co.* (1901) 84 Minn. 116, 86 N. W. 888; *Virginia F. & M. Ins. Co.* v. *Wells* (1887) 83 Va. 736, 3 S. E. 349. Other courts, endeavoring to reach the same result, have sought to read a like meaning into policies wherein the event with

which the period was to commence was expressly specified. *Kiisel* v. *Mutual Reserve Ins. Co.* (1906) 131 Iowa 54, 107 N. W. 1027; *Case* v. *Sun Ins. Co.* (1890) 83 Cal. 473, 23 Pac. 534. The better reasoned decisions, however, refuse to change the insurance contract by disregarding the expressed intentions of the parties. *McElroy* v. *Continental Ins. Co.* (1892) 48 Kan. 200, 29 Pac. 478; *Maxwell Bros.* v. *Liverpool etc. Ins. Co.* (1912) 12 Ga. App. 127, 76 S. E. 1036; see *Virginia F. & M. Ins. Co.* v. *Wells, supra.* But it is firmly established that, where the insurer's bad faith prevents the accural of the right of action until after the period has elapsed, the limitation is waived, and the insurer is precluded from setting it up as a defence. *Thompson* v. *Phenix Ins. Co.* (1890) 136 U. S. 287, 297, 10 Sup. Ct. 1019, 1023; *Goodwin* v. *Merchants' etc. Ins. Co.* (1902) 118 Iowa 601, 92 N. W. 894; *Home Ins. Co.* v. *Myer* (1879) 93 Ill. 271.

INTERNED ALIEN ENEMY—RIGHT TO SUE IN COURTS OF BELLIGERENT.—In a suit for an injunction against breach of contract, the defendant pleaded that the plaintiff was an interned German civilian, and hence was debarred from recourse to the courts. *Held,* internment does not deprive the plaintiff of his right to resort to the courts. *Schaffenius* v. *Goldberg* (Ct. of App. 1915) 140 L. T. 88.

The early common law, while it permitted an alien friend to maintain personal actions, denied to an alien enemy the right to bring any action whatever until peace was declared. Co. Litt. 129 b; Bac. Abr. Tit. Aliens D. But the plea of alien enemy came to be strongly condemned by the courts, see *Sparenburgh* v. *Bannatyne* (1797) 1 Bos. & Pul. 163, and the right of an alien enemy dwelling under license within the belligerent country to resort to its courts was recognized; *Wells* v. *Williams* (1698) 1 Raym. 282; *Topay* v. *Crow's Nest etc. Co.* (1914) 20 Br. Col. 235; *Clarke* v. *Morey* (1813) 10 Johns. 69; *cf. Viola* v. *Mackenzie, Mann & Co.* (1915) 24 D. L. R. 208; but *cf. Russel* v. *Skipwith* (Pa. 1814) 6 Binn. 241; while it was denied, for reasons of policy, to an alien enemy residing in his native country. *Brandon* v. *Nesbitt* (1794) 6 T. R. 23; see *Wells* v. *Williams, supra*; *Clarke* v. *Morey, supra.* A prisoner of war cannot sue a writ of habeas corpus, *Rex* v. *Schiever* (1759) 2 Burr. 765; *Furly* v. *Newnham* (1780) 2 Doug. *419, and the Aliens Restriction Order (1914) 111 L. T. R., Statutes, 12 *et seq.*, requiring the interment of aliens of enemy nationality, so far makes those interned prisoners of war that they cannot sue out a writ of habeas corpus. *Rex* v. *Superintendent etc.* [1915] 3 K. B. 716; *Ex parte Weber* [1916] 1 K. B. 280, aff'd. (H. L. 1916) 32 T. L. R. 312. But with this exception, since in effect the interment is a license or rather a command that the alien enemy remain within the country, the persons so permitted to remain should be accorded the same rights to use the courts as other aliens. *Princess Thurn and Taxis* v. *Moffitt* [1915] 1 Chanc. 58; Hall, International Law (6th ed.) 388. No rule of public policy requires that the plaintiff in such a situation as in the principal case, should be put to the disadvantage of having his rights suspended during the continuance of the war; and the conclusion of the court rests on sound principle and justice.

MARRIAGE ANNULMENT—IMPOTENCY.—The husband sued for an annulment of the marriage on the ground of the impotency of his wife. *Held,* if a slight operation will remove the incapacity without endangering life and health, the fact that the incapable one refuses to submit

to such treatment does not justify an annulment, since such incapacity is not incurable within the meaning of the law. *Anonymous* (N. Y. Sup. Ct., Spec. Term, 1916) 54 N. Y. L. J. 2414.

In England under the canon law, impotency existing at the time of the marriage was cause for a divorce or marriage annulment, see *G.* v. *G.* (1870) 33 Md. 401, 407, but as this ground was cognizable only by the ecclesiastical courts and such tribunals do not exist in the United States, it is held that in the absence of statutes on the subject our courts have no jurisdiction to annul a marriage for such cause. *Anonymous* (1873) 24 N. J. Eq. 19; 1 Bishop, Marriage and Divorce, (6th ed.) § 72. These statutes have been generally enacted in the various states. *Bunger* v. *Bunger* (1911) 85 Kan. 564, 117 Pac. 1017; *Payne* v. *Payne* (1891) 46 Minn. 467, 49 N. W. 230. "Impotency", such as to justify annulment of the marriage, means an incapacity for *copula vera,* as distinguished from incomplete copulation or lack of power of procreation. *Jorden* v. *Jorden* (1900) 93 Ill. App. 633; *Anonymous* (1889) 89 Ala. 291, 7 So. 100; *D——* v. *A——* (1845) 1 Rob. Ecc. 279. This condition must have existed at the time of the marriage and be permanent and incurable, *Bascomb* v. *Bascomb* (1852) 25 N. H. 267; *Kempf* v. *Kempf* (1863) 34 Mo. 211, so that a slight operation not injurious to life or health would not remove the difficulty, *Devanbagh* v. *Devanbagh* (N. Y. 1836) 6 Paige 175; see *Bascomb* v. *Bascomb, supra.* The fact that the defendant will not submit to this operation does not warrant a divorce in New York, *Devanbagh* v. *Devanbagh, supra*; but this is not the universal rule, *L.* v. *W.* (1882) 51 L. J. P. D. & Adm. 23; *cf. Griffeth* v. *Griffeth* (1896) 162 Ill. 368, 44 N. E. 820; but *cf. S.* v. *E.* (1863) 3 Swab. & Tr. 240. In the absence of other evidence the English courts have applied the triennial test of the canon law and granted a decree of nullity where there has been cohabitation for three years without consummation—thus, where after that length of time the wife appears to be *virgo intacta et apta viro,* the husband's impotency will be presumed. *Sparrow* v. *Harrison* (1841) 3 Curt. Ecc. 16; see *F.* v. *D.* (1865) 4 Swab. & Tr. 86.

MORTGAGES—GRANTEE OF MORTGAGED LAND—LIABILITY TO MORTGAGEE.—A mortgagor conveyed the mortgaged premises to a purchaser subject to the mortgage, the amount thereof being deducted from the price. In a foreclosure suit the purchaser attempted to contest the validity of the mortgage as to his grantor. *Held,* he was precluded from contesting the mortgage. *United States Bond & Mortgage Co.* v. *Keahey* (Okla. 1916) 155 Pac. 557.

The grantee of mortgaged premises who has assumed the payment of the mortgage may avoid his personal liability for a deficiency on a foreclosure sale by showing the non-liability of his grantor only in a jurisdiction where the mortgagee sues on the equitable subrogation theory. *Norwood* v. *De Hart* (1879) 30 N. J. Eq. 412; *Vrooman* v. *Turner* (1877) 69 N. Y. 280; 16 Columbia Law Rev. 352. If he has not assumed the mortgage but has taken subject to it, the amount thereof being deducted from the purchase price, it is generally held, as in the principal case, that he may not contest the validity of the mortgage on foreclosure even where the subrogation theory obtains. *McConihe* v. *Fales* (1887) 107 N. Y. 404, 14 N. E. 285. *A fortiori,* he cannot do so in a state where the mortgagee sues as the beneficiary of the contract between the grantee and grantor. The grantee, therefore, may not prove usury, see *Trusdell* v. *Dowden* (1890) 47 N. J. Eq. 396, 20 Atl. 972, or that the land was homestead, *Batts* v. *Banking Co.*

(1901) 26 Tex. Civ. App. 515, 63 S. W. 1046, or that a statute prohibited a mortgage at that time. *Jones* v. *Perkins* (1914) 43 Okla. 734, 144 Pac. 183. It is argued that there is no inequity in holding the grantee to his contract, whereas to release him would be a fraud on the mortgagee and grantor. *Fuller & Co.* v. *Hunt* (1878) 48 Iowa 163. Of course if the grantor is liable independently of the mortgage, the grantee must indemnify him, see *Selby* v. *Sanford* (1898) 7 Kan. App. 781, 54 Pac. 17, but if the grantor has a defense there seems to be no reason for allowing the mortgagee to recover a debt which his own misconduct may have barred as against the mortgagor. A few jurisdictions hold that a grantee, taking a deed which recites the mortgage, is estopped thereby. *Foy* v. *Armstrong* (1901) 113 Iowa 629, 85 N. W. 753; *Johnson* v. *Thompson* (1880) 129 Mass. 398. A more satisfactory theory is that the grantor has in effect given the grantee the cash to pay the debt, and the latter is a mere messenger to deliver it to the mortgagee. *Hiner* v. *Whitlow* (1899) 66 Ark. 121, 49 S. W. 353.

PATENTS—INFRINGEMENT—COSTS IN MASTER'S PROCEEDINGS.—After the jury had found that the plaintiff's patent had been infringed, references were ordered to a special master to take and state an account of profits and damages. On application by the master for an order specifying which party should pay in the first instance for the proceedings before him, *held,* each party should pay the costs and expenses made by himself, leaving the question of their ultimate payment to be determined when the final decree is entered. *Panoulias* v. *National Equipment Co.* (D. C., S. D., N. Y. 1915) 227 Fed. 1008.

Though courts have infrequently passed on the subject, still there are, as pointed out in the principal case, three views as to which party should, in the first instance, bear the costs of expenses incurred before a master. One view is that the burden should be on the complainant; *Macdonald* v. *Shepard* (C. C. 1882) 10 Fed. 919; another, that where the defendant has been adjudged an infringer, he should pay such costs; *Urner* v. *Kayton* (C. C. 1883) 17 Fed. 539; while the third is that each party should pay his own costs. *U. S. Printing Co.* v. *American Playing-Card Co.* (C. C. 1897) 81 Fed. 506; *cf. Brickill* v. *Mayor etc., of New York* (C. C. 1893) 55 Fed. 565. Of these three rules the last seems preferable, as it tends toward prompting the parties to confine their expenses to those which are reasonably necessary, and as it does not saddle an unwarranted burden on either party before the termination of the action. See *U. S. Printing Co.* v. *American Playing-Card Co., supra.*

PLEADING AND PRACTICE—NEGATIVING EXCEPTIONS.—Rev. Stat. 1909, § 8315, declares that any person practicing medicine or surgery without license from the state board of health, shall be guilty of a misdemeanor, provided that physicians registered on or prior to March 12, 1901, shall be regarded for every purpose as licentiates and registered physicians under the provisions of this article. *Held,* that it was not necessary to negative the exception in the information. *State* v. *Saak* (Mo. App. 1916) 182 S. W. 1074.

Where an exception or proviso in a statute is part of the description of the offense, or a qualification of the language defining or creating it, the exception must be negatived in the indictment or information, *State* v. *Connor* (1906) 142 N. C. 701, 55 S. E. 787; *Binhoff* v. *State* (1907) 49 Ore. 419, 90 Pac. 586, but where the exception merely ex-

empts certain persons or acts from the operation of the statute, it need not be negatived in the pleading, as it is matter of defense. *State* v. *Gallagher* (1897) 20 R. I. 266, 38 Atl. 655; *Hale* v. *State* (1898) 58 Ohio St. 676, 51 N. E. 154; *Blocker* v. *State* (1912) 12 Ga. App. 81, 76 S. E. 784. It is sometimes stated that the indictment must negative exceptions in the enacting clause but not those in other clauses, *Commonwealth* v. *Maxwell* (1824) 19 Mass. 139; *Byrd* v. *State* (1910) 59 Tex. Cr. 513, 516, 129 S. W. 620, 622, but this is hardly a precise statement of the rule, for it is the nature of the exception and not its location which is decisive. Not every exception in the section containing the enacting clause need necessarily be negatived in the pleading. The real question is whether the exception or proviso is so incorporated with the enactment as to constitute a material part of the definition or description of the offense. *State* v. *Abbey* (1856) 29 Vt. 60; *United States* v. *Cook* (1872) 84 U. S. 168. If the offense is clearly defined without reference to the exception, the pleader need not refer to it, even though it be in the same section with the enacting clause. *Ex parte Hornef* (1908) 154 Cal. 355, 97 Pac. 891; *State* v. *Moore* (1914) 166 N. C. 284, 81 S. E. 294. While it is a close question in the principal case, it seems that the court was right in regarding the proviso as a mere exemption of a certain class from the operation of the statute.

Pleading and Practice—Special Appearance—Waiver of Objections by Subsequent General Appearance.—The defendant appeared specially and filed a plea attacking the jurisdiction of the court over his person. The plea was overruled, and an exception taken. Following a subsequent motion to make the complaint more definite, the defendant pleaded to the merits, reserving its objection to the jurisdiction. *Held,* the defendant had not waived the objection. *Commonwealth Cotton Oil Co.* v. *Hudson* (Okla. 1916) 155 Pac. 577.

Where the defendant appears specially to object to the jurisdiction of the court over his person, and his objection made at such time is overruled, it has been held in some states that a subsequent general appearance waives the objection. *Franklin Life Insurance Co.* v. *Hickson* (1902) 197 Ill. 117, 64 N. E. 248; *Henry* v. *Spitler* (1914) 67 Fla. 146, 64 So. 745; *cf.* 6 Columbia Law Rev. 60. But the better reasoned line of decisions, of which the principal case is typical, holds that, if the defendant excepts to the adverse ruling on the question of jurisdiction, his subsequent pleading to the merits does not operate as a waiver, since, under the circumstances, it is scarcely voluntary on his part. *Harkness* v. *Hyde* (1878) 98 U. S. 476; *Fisher* v. *Crowley* (1905) 57 W. Va. 312, 50 S. E. 422; *State ex rel. Lane* v. *District Court* (Mont. 1915) 154 Pac. 200; see 12 Columbia Law Rev. 281. The objection must be preserved, however, in all subsequent pleadings, *Chicago, R. I. & P. Ry.* v. *Jaber* (1908) 85 Ark. 232, 107 S. W. 1170, and the defendant will be deemed to have waived it if he enters a general appearance before a decision has been rendered on the question raised by his special appearance, *Perkins* v. *Hayward* (1892) 132 Ind. 95, 31 N. E. 670; *Barnes* v. *Western Union Tel. Co.* (C. C. 1903) 120 Fed. 550; but *cf.* *Wheeler* v. *Wilkins* (1869) 19 Mich. 78, or asks for affirmative relief, since he thereby invokes the jurisdiction of the court. *Lower* v. *Wilson* (1896) 9 S. D. 252, 68 N. W. 545; *Chandler* v. *Citizens National Bank* (1898) 149 Ind. 601, 49 N. E. 579. But since a motion to make more definite is clearly not a request for affirmative relief, the court in the principal case correctly held that the defendant had not waived his objection to the jurisdiction.

RIGHT OF PRIVACY—CO-PARTNERSHIP—SECTION 51 OF NEW YORK CIVIL RIGHTS LAW.—In an action for the unauthorized use of the name of a co-partnership, under § 51 of the Civil Rights Law, providing that "Any person whose name, portrait or picture is used within this state for advertising purposes or for purposes of trade without written consent . . . many maintain an equitable action . . . against the person, firm or corporation so using his name", *held*, that the name of a co-partnership is not within the purview of this section. *Rosenwasser* v. *Ogoglia* (App. Div., 2nd Dept., 1916) 158 N. Y. Supp. 56.

The New York courts have construed this statute rather strictly, for it is, in part at least, penal (see § 50), and should be interpreted accordingly. *Jeffries* v. *New York Evening Journal Pub. Co.* (1910) 67 Misc. 570, 124 N. Y. Supp. 780; *Merle* v. *Sociological Research Film Corp.* (1915) 166 App. Div. 376, 152 N. Y. Supp. 829; see *Binns* v. *Vitagraph Co.* (1913) 210 N. Y. 51, 103 N. E. 1108. Thus they have held that the use must be continuous and one that is clearly for advertising or trade purposes, as it was such evils that the statute was intended to prevent. *Moser* v. *Press Pub. Co.* (1908) 59 Misc. 78, 109 N. Y. Supp. 963; *Colyer* v. *Fox Pub. Co.* (1914) 162 App. Div. 297, 146 N. Y. Supp. 999; *Merle* v. *Sociological Research Film Corp., supra.* A co-partnership is not included in the definition of the term "person" in § 37 of the General Construction Law, and as it is not a person, *Matter of Peck* (1912) 206 N. Y. 55, 60, 99 N. E. 258, 259; Burdick, Partnership (2nd ed.) 81, it has no rights under this statute, for the act created a personal right. See *Ellis* v. *Hurst* (1910) 66 Misc. 235, 121 N. Y. Supp. 438. Nor does this case seem to come within the general purview of the act, for the statute was directed at practices such as those revealed in *Robertson* v. *Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442, the refusal of equitable relief in that case leading to the passage of the act. The most prominent element in such cases, the injury to the sensibilities of the individual from the intrusion upon his privacy, is entirely lacking in the case of a co-partnership.

STATUTE OF FRAUDS—SALE OF GOODS—AGREEMENT TO BUY AND DIVIDE.—Plaintiff and defendant entered into an oral contract to purchase jointly a stock of goods at an insolvency sale. Half of the purchase price was to be paid by each party; the proceeds of any resales were to be equally shared, and the remaining goods were to be divided at an inventory valuation. Defendant bid in the goods at the sale and, in repudiation of the contract, retained them all. *Held*, this agreement was not within the Statute of Frauds. *Stack* v. *Roth Bros. Co.* (Wis. 1916) 156 N. W. 348.

An oral contract between two or more parties to undertake the purchase of goods for division between themselves or for resale to other parties is not within the Statute of Frauds, *Hunt* v. *Elliott* (1881) 80 Ind. 245; *Reaves* v. *Roff* (1809) 3 N. J. L. 609; *cf. Mason* v. *Spiller* (1904) 186 Mass. 346, 71 N. E. 779, unless the contract also involves a sale between the parties themselves. *Brown* v. *Slauson* (1868) 23 Wis. 244. In such circumstances as occur in the principal case, equity will raise a constructive trust for the benefit of the injured party which may be established by parol evidence. 1 Perry, Trusts § 166; Brown, Statute of Frauds, § 96a; *Strong* v. *Glasgow* (1813) 6 N. C. 289. The contract between the parties not being within the Statute of Frauds, it would seem that this statute should not hinder a recovery, either in law upon the contract, or in equity on the theory

of a constructive trust, against the corporation which acquired and retained the legal title to the stock of goods to the exclusion of the plaintiff. *King* v. *Barnes* (1888) 109 N. Y. 267, 16 N. E. 332.

TAXATION—CONSTITUTIONAL LAW—INCOME TAX.—In a suit to enjoin compliance with the income tax provisions of the tariff act of 1913, *held,* the act is authorized by the Sixteenth Amendment and is not wanting in due process. *Brushaber* v. *Union Pacific R. R.* (1916) 240 U. S. 1, 36 Sup. Ct. 236.

Notwithstanding numerous dicta that direct taxes included only capitation and land taxes, see *Hylton* v. *United States* (1796) 3 U. S. *171; *Pacific Insurance Co.* v. *Soule* (1868) 74 U. S. 433; *Veazie Bank* v. *Fenno* (1869) 75 U. S. 533, and despite express holdings that an income tax was not a direct tax, *Springer* v. *United States* (1880) 102 U. S. 586; *Smedberg* v. *Bentley* (C. C. 1874) 21 Int. Rev. Rec. 38, 22 Fed. Cas. 368; see *Scholey* v. *Rew* (1874) 90 U. S. 331; *cf. Waring* v. *The Mayor, etc. of Savannah* (1878) 60 Ga. 93, it was finally decided that a tax on the income derived from real and personal property, being in effect a tax upon the property itself because of its ownership, was a direct tax and must be apportioned. *Pollock* v. *Farmers' Loan and Trust Co.* (1895) 157 U. S. 429, 15 Sup. Ct. 673; 158 U. S. 601, 15 Sup. Ct. 912. By the Sixteenth Amendment, however, Congress is now authorized to levy a tax on incomes, "from whatever source derived", without apportionment. See 10 Columbia Law Rev. 379. In the principal case, this amendment is held to be consistent with the clause requiring apportionment of direct taxes, and is construed to prevent a resort to the sources of an income to take the tax thereon out of the class of indirect taxes, and place it in that of direct. Apparently, however, under this interpretation the amendment does not foreclose the possibility that by some other criterion, as yet undiscovered, an income tax may still be construed as direct and requiring apportionment. The income tax law in question, moreover, is not unconstitutional as a violation of the due process clause, since the taxing power of Congress is restricted only by the express limitation of the Constitution, and not by the Fifth Amendment, *Billings* v. *United States* (1914) 232 U. S. 261, 282, 34 Sup. Ct. 421, unless the act complained of is so arbitrary as to amount to a taking of property.

WILLS AND ADMINISTRATION—VESTED INTEREST AFTER GIFT OF PERSONALTY IN TRUST FOR LIFE—WHEN ADMINISTRATION IS UNNECESSARY.—Where personalty was given to executors in trust to pay the income to A for life, "and at her decease the principal to go to" B, *held,* that B took a vested rather than a contingent interest so that, upon B's predeceasing A, it passed to B's representatives. At A's death, since there appeared to be no creditors of B's estate, the principal could be paid directly to the sole distributee of B, without administration. *Matter of Van Kleeck* (Surr. Ct., N. Y. Co., N. Y. 1916) 55 N. Y. L. J. 187.

A remainder given directly, after a gift in trust to pay the income for life, is vested, so that upon the death of the remainderman before the *cestui que trust,* the gift of the remainder does not lapse. *West* v. *Smith* (1911) 89 S. C. 540, 72 S. E. 395; *Matter of Heinze* (1897) 20 Misc. 371, 46 N. Y. Supp. 247; *Buswell* v. *Newcomb* (1903) 183 Mass. 111, 66 N. E. 592. Although generally all estates of decedents are subject to administration, the purpose of the administration is to pay off the debts of the estate and to effect distribution, and hence, where

there are no debts to be paid and distribution can be made otherwise, or where there is a sole distributee, administration may be dispensed with. Woerner, Administration § 201; *Glover* v. *Hill* (1888) 85 Ala. 41, 4 So. 613; see *Foote* v. *Foote* (1886) 61 Mich. 181, 190, 28 N. W. 90. Thus where there are no creditors and the distributees, all being adults, make a fair division of the estate by agreement without administration, a court of equity will uphold such a voluntary division. *McCaa* v. *Woolf* (1868) 42 Ala. 389, 394; *Brashear* v. *Conner* (1877) 29 La. Ann. 347; *Waterhouse* v. *Churchill* (1902) 30 Colo. 415, 70 Pac. 678. If no claims have been made, and the evidence before the court is to the effect that there are no creditors, the existence of debts will generally not be presumed, *McCaa* v. *Woolf, supra*; *Waterhouse* v. *Churchill, supra,* though it has been intimated that such evidence is not conclusive, and the statutory period must elapse before it can be ascertained that no debts exist. *Becraft* v. *Lewis* (1890) 41 Mo. App. 546; *McDowell* v. *Orphan School* (1901) 87 Mo. App. 386.

WITNESSES—IMPEACHMENT—ADMISSIBILITY OF EVIDENCE AS TO REPUTATION TO SUSTAIN.—In a civil action, the plaintiff, as witness in his own behalf, admitted on cross-examination a previous conviction for forgery. *Held,* it was error to thereafter exclude testimony as to his general reputation. *Derrick* v. *Wallace* (N. Y. 1916) 55 N. Y. L. J. 233.

Though neither in civil nor criminal cases is evidence of the defendant's reputation generally admissible in order to draw an adverse inference therefrom, still, when a party takes the stand as a witness, he is subject to all the rules applicable to witnesses. *People* v. *Newman* (1913) 261 Ill. 11, 103 N. E. 589; *Smith* v. *State* (1903) 137 Ala. 22, 34 So. 396; 4 Chamberlayne, Evidence §§ 3273-6. A witness may be impeached by testimony as to his reputation for truth and veracity, by proof of inconsistent statements, or by evidence of specific acts of criminal or moral turpitude, see *First Nat. Bank* v. *Blakeman* (1907) 19 Okla. 106, 91 Pac. 868; *Stevenson* v. *Gunning's Estate* (1892) 64 Vt. 601, 25 Atl. 697, but the mere introduction of contradictory evidence or proof of indictment for crime not followed by conviction will not suffice. *People* v. *Cascone* (1906) 185 N. Y. 317, 334, 78 N. E. 287; *Stevenson* v. *Gunning's Estate, supra.* And though former conviction for crime may be proved by the introduction of the record of conviction, still the general view, usually authorized by statutory provision, is that such conviction, or actual guilt without conviction, may also be brought out on cross-examination of the witness himself, and will be effective to impeach him. *Dotterer* v. *State* (1909) 172 Ind. 357, 88 N. E. 689; *State* v. *Hill* (1903) 52 W. Va. 296, 43 S. E. 160; *Kraimer* v. *State* (1903) 117 Wis. 350, 93 N. W. 1097. Though there is a conflict among courts when impeachment is by proof of former guilt or conviction for crime, 2 Wigmore, Evidence § 1106, still it is the better view that when a witness has been impeached in any way, evidence that his reputation for truth and veracity is good is admissible to sustain him. *Kraimer* v. *State, supra; Gazeway* v. *State* (1914) 15 Ga. App. 467, 83 S. E. 857. The admission of such rehabilitating evidence seems clearly correct, as it is entirely conceivable that a former criminal may have reformed and that, if such be the case, his previous moral turpitude should not be allowed to render his testimony unworthy of belief. *Shields* v. *Conway* (1909) 133 Ky. 35, 117 S. W. 340. This is the ruling of the principal case and it seems unquestionably sound.